

Evidentiary Foundations

Thirteenth Edition

Evidentiary Foundations

Thirteenth Edition

Edward J. Imwinkelried

EDWARD L. BARRETT, JR. PROFESSOR OF LAW EMERITUS,
UNIVERSITY OF CALIFORNIA AT DAVIS SCHOOL OF LAW

2025



CAROLINA ACADEMIC PRESS
Durham, North Carolina

ISBN: 978-1-5310-3201-2
eISBN: 978-1-5310-3202-9

Library of Congress Cataloging-in-Publication Data

Names: Imwinkelried, Edward J., author.
Title: Evidentiary foundations / Edward Imwinkelried, Edward L. Barrett, Jr. Professor of Law Emeritus, University of California at Davis School of Law
Description: Thirteenth Edition. | New York : LexisNexis, 2025. | Includes index. |
Summary: "Evidentiary Foundations provides sample lines of questioning that demonstrate how to lay the foundation for admitting various kinds of evidence. It also includes a brief discussion of the underlying legal principles, based on modern common law and the applicable Federal Rules of Evidence"—Provided by publisher.
Identifiers: LCCN 2025000187 (print) | LCCN 2025000188 (ebook) | ISBN 9798341703018 (hardcover) | ISBN 9798341703025 (ebook)
Subjects: LCSH: Evidence (Law)—United States.
Classification: LCC KF8935 .I45 2025 (print) | LCC KF8935 (ebook) | DDC 347.73/6—dc23/eng/20250107
LC record available at <https://lcn.loc.gov/2025000187>
LC ebook record available at <https://lcn.loc.gov/2025000188>

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2025 Carolina Academic Press, LLC
All Rights Reserved

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work.

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

Dedication

I would like to dedicate my work on this text to:
Cindy, Marie, Ken, Kindra, and Danielle; my parents, the late Enes and John Imwinkelried; and
my parents-in-law, the late Lyman (Brownie) and Mary Jane Clark.

Acknowledgements

The author would like to express his thanks to: Ms. Nichelle Walker, who helped prepare the 11th edition; Mr. Jay Paik, class of 2003, University of California, at Davis Law School, who proofread the manuscript for the fifth edition; Ms. Ryan Hall, class of 1998, University of California, at Davis Law School, who proofread the manuscript for the fourth edition; Ms. Kristin Lucey, class of 1996, University of California, at Davis Law School, who researched and proofread the manuscript for the third edition; Mr. Ronald Richards, class of 1989, University of California, at Davis Law School, who researched and proofread the manuscript for the first edition; Jennifer Angeles, Glenda McGlashan, Jessica Drushell, Cynthia Coble, Kristi Case, Diane Monheit, Helen Forsyth, Berta Lewin, Paula Buchignani, and Kathy Houston, who typed the manuscript; and his colleagues, Richard C. Wydick, James E. Hogan, Michael Graham, John O'Brien, David Schlueter, Thomas Stewart, Sam Stonefield, and Dr. Marty Greer, DVM. In 1988, Professors Wydick and Hogan helped the author prepare a special California edition of *Evidentiary Foundations*; and in 1994 and 2000, we prepared the second and third editions of that text. Professor Leach has coauthored the fourth and fifth editions of that text. Their comments on the manuscripts for *California Evidentiary Foundations* were instrumental in preparing this edition of *Evidentiary Foundations*. Professor Graham led the teams which prepared the special Florida and Illinois editions. Whenever the technology advances, Professor Graham prods me to keep this text at the cutting edge. He has inspired many of the improvements in this text. Professor Schlueter leads the teams which prepared the Texas and military editions. He was especially helpful in drafting the new foundation for STR DNA typing. Professor Stonefield was kind enough to give the fifth edition of this text a very close read and made several acute suggestions for improving the text. Dr. Greer made several excellent suggestions for improving and expanding the X-ray foundation in the seventh edition. Professor David Schlueter, my coauthor on *Texas* and *Military Evidentiary Foundations*, made several suggestions for additions to the eighth edition. Professors O'Brien and Stewart prepared the new edition of *Missouri Evidentiary Foundations*, which included several revised foundations.

Table of Contents

A DETAILED SYNOPSIS FOR EACH CHAPTER APPEARS AT THE BEGINNING OF THE CHAPTER

Chapter 1	INTRODUCTION
§ 1.01	Introduction
§ 1.02	Laying a Foundation—In General
[1]	Legal Rules
[2]	Practical Rules
§ 1.03	Laying a Foundation on Direct Examination
[1]	In General
[2]	Legal Rules
[3]	Practical Rules
§ 1.04	Laying a Foundation on Cross-Examination
[1]	In General
[2]	Legal Rules
[3]	Practical Rules
Chapter 2	RELATED PROCEDURES
§ 2.01	Introduction
§ 2.02	Pretrial Motion <i>In Limine</i> by the Opponent
[1]	The Doctrine
[2]	Elements of a Motion <i>In Limine</i>
[3]	Sample Motion <i>In Limine</i>
§ 2.03	Objections at the Trial by the Opponent
[1]	The Doctrine
[2]	Elements of an Objection
[3]	Sample Objections
§ 2.04	Motions to Strike at Trial by the Opponent
[1]	The Doctrine
[2]	Elements of a Motion to Strike
[3]	Sample Motion to Strike
§ 2.05	Request by the Opponent to Take a Witness on Voir Dire
[1]	The Doctrine
[2]	Sample Request to Take a Witness on Voir Dire
§ 2.06	Offer of Proof by the Proponent
[1]	The Doctrine
[2]	Elements of an Offer of Proof
[3]	Sample Offer of Proof

Table of Contents

Chapter 3 THE COMPETENCY OF WITNESSES

- § 3.01 Introduction
- § 3.02 The Voir Dire of a Child by the Witness's Proponent
 - [1] The Doctrine
 - [2] Elements of the Foundation
 - [3] Sample Foundation
- § 3.03 The Questioning of a Lay Witness by the Proponent to Demonstrate Personal Knowledge
 - [1] The Doctrine
 - [2] Elements of the Foundation
 - [3] Sample Foundation
- § 3.04 The Opponent's Presentation of Psychiatric Testimony Attacking a Prospective Witness's Competency
 - [1] The Doctrine
 - [2] Elements of the Foundation
 - [3] Sample Foundation
- § 3.05 The Witness Spouse
 - [1] The Doctrine
 - [2] Elements of the Foundation
 - [3] Sample Foundation
- § 3.06 Dead Persons' Statutes or Survivors' Evidence Acts
 - [1] The Doctrine
 - [2] Elements of the Foundation
 - [3] Sample Foundations

Chapter 4 AUTHENTICATION

- § 4.01 Authentication in General
 - [1] Introduction
 - [2] Authentication in Traditional Courtrooms
 - [3] Authentication in Computerized Courtrooms
 - [a] In General
 - [b] The Presentation of an Unmarked Hard Copy by Using a Document Camera
 - [c] The Presentation of a Premarked Exhibit by Using a Document Camera
 - [d] The Presentation of Digitized Exhibits Loaded Onto a Computer
- § 4.02 The Authentication of Private Writings
 - [1] Writings can also Raise Issues of Best Evidence and Hearsay
 - [2] Testimony of a Witness Who Observed the Document's Execution
 - [3] Testimony of a Witness Familiar With the Author's Handwriting Style
 - [4] The Reply Letter Doctrine

Table of Contents

[5]	A Comparison by an Expert Questioned Document Examiner
[6]	A Printout From a Social Media Profile Page
[7]	Text Messages
[8]	Ancient Writings
§ 4.03	The Authentication of Business Writings
[1]	Conventional Business Writings
[2]	Computer Records
[3]	“Faxed” Documents
[4]	E(lectronic)-Mail
[a]	Overview
[b]	Evidentiary Doctrines and Foundational Elements for Authenticating E-Mail
[c]	Sample Foundations
[i]	In General
[ii]	Chain of Custody Handling Testimony by an Employee of an E-Mail Service
[iii]	Testimony about a Digital Signature
[5]	Scanned Writings
[6]	Information Posted at a Business Web Site
[7]	Self-Authenticating Business Records
[8]	Self-Authenticating Printouts of Records Automatically Generated by an Electronic Process or System
[9]	Self-Authenticating Printouts of Data Copies from an Electronic Device, Storage Medium, or File
[10]	The Authentication of Printouts of Records Maintained on a Blockchain
[11]	The Authentication of Records Stored in the Cloud
§ 4.04	The Authentication of Official Writings
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 4.05	The Authentication of Oral Statements
[1]	In General
[2]	Lay Opinion Testimony of a Witness Familiar with the Speaker’s Voice
[3]	The Telephone Directory Doctrine
[4]	Testimony by a Voiceprint or Sound Spectrography Expert
[5]	Caller Identification
[a]	The Doctrine
[b]	Elements of the Foundation
[c]	Sample Foundation

Table of Contents

§ 4.06	Audio Recordings
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 4.07	Illustrative or Demonstrative Evidence
[1]	In General
[2]	Demonstrative Evidence
[a]	Diagrams
[b]	Models
[3]	Illustrative Aids
§ 4.08	The Identification of Real or Original Physical Evidence
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 4.09	The Verification of Photographs
[1]	Still Photographs
[2]	Motion Pictures and Videotapes
[3]	X-Rays
[4]	Automated Surveillance Cameras
[5]	Computer Animations and Simulations (CGA)
[a]	In General
[b]	Illustrative Evidence
[c]	Substantive Evidence
[6]	Enhanced Photographs
[7]	Satellite Imagery
§ 4.10	The Validation of Scientific Evidence
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 4.11	The Challenges Posed by AI and Deepfakes
[1]	General Overview of the Technology
[2]	The Evidentiary Issues Posed by Specific Variations of the Use of AI Technology
[a]	The Proponent Proffers the Exhibit as Purely an Illustrative Aid
[b]	The Proponent Proffers the Exhibit, Produced by an AI Tool, As Substantive Evidence
[c]	The Proponent Offers as Substantive Evidence an Exhibit That The Proponent Claims Has Been Accurately Edited or Properly Modified by an AI Tool
[d]	The Proponent Offers an Exhibit Without Stating Whether It Is the Product of an AI Application, and the Opponent Claims That the

Table of Contents

Exhibit Is an AI Product That Is Inadmissible Without a *Frye* or
Daubert Foundation

Chapter 5 RULE 403 AND LEGAL IRRELEVANCE LIMITATIONS ON CREDIBILITY EVIDENCE

PART A.	Introduction
§ 5.01	Overview
§ 5.02	The Stages of Credibility Analysis
PART B.	Bolstering Witnesses Before Impeachment
§ 5.03	Prior Identification
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 5.04	Fresh Complaint
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
PART C.	Impeachment of Witnesses
§ 5.05	Bad Acts That Have Not Resulted in a Conviction
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 5.06	Proof of the Character Trait of Untruthfulness
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 5.07	Proof That the Witness Has Failed a Polygraph Examination
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 5.08	Proof that Another Witness Specifically Contradicts the Testimony of the Witness to Be Impeached
§ 5.09	Proof that the Witness Made a Prior Inconsistent Statement
[1]	In General
[2]	Cross-Examination to Elicit a Witness’s Concession that the Witness Earlier Made an Inconsistent Statement
[3]	Extrinsic Evidence of a Prior Inconsistent Statement
[4]	Evidence of the Witness’s Failure to Mention a Fact in a Prior Statement
§ 5.10	Proof that the Witness has Suffered a Conviction

Table of Contents

[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 5.11	Proof that the Witness Is Biased
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 5.12	Proof that the Witness Is Deficient in an Element of Competency
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
PART D. Rehabilitation of Witnesses After Impeachment	
§ 5.13	Prior Consistent Statement
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 5.14	Proof of the Character Trait of Truthfulness
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation

Chapter 6 LEGAL IRRELEVANCE LIMITATIONS ON EVIDENCE THAT IS RELEVANT TO THE HISTORICAL MERITS OF THE CASE

§ 6.01	Introduction
§ 6.02	Character Evidence
[1]	Overview
[2]	Reputation Character Evidence
[3]	Opinion Character Evidence
[4]	Proof of Character by Specific Instances of Conduct
[5]	Cross-Examination of a Character Witness
§ 6.03	Habit or Routine Practice Evidence
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 6.04	Other Crimes or Uncharged Misconduct Evidence
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 6.05	Uncharged Misconduct Evidence in Civil Actions
[1]	The Doctrine
[2]	Elements of the Foundation

Table of Contents

[3]	Sample Foundation
§ 6.06	Similar Happenings Evidence
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 6.07	In-Court Exhibitions
§ 6.08	In-Court Demonstrations
§ 6.09	Liability Insurance

Chapter 7 PRIVILEGES AND SIMILAR DOCTRINES

§ 7.01	Introduction
§ 7.02	Privileges for Confidential Relations—In General
§ 7.03	Privileges for Confidential Information—Invoking a Privilege
[1]	Elements of the Foundation
[2]	Sample Foundation
§ 7.04	Privileges for Confidential Relations—Defeating a Privilege by Proving Waiver
[1]	In General
[2]	In-Court Waiver
[3]	Out-Of-Court Waiver
§ 7.05	Privileges for Confidential Relations—Defeating a Privilege by Proving a Special Exception
[1]	In General
[2]	At the Time of the Communication, the Holder Sought the Information to Facilitate a Future Crime or Fraud
[3]	The Joint Consultation Situation
[4]	The Patient-Litigant Exception
§ 7.06	The Work Product Protection
[1]	The Conditional Work Product Protection
[2]	The Absolute Work Product Protection
§ 7.07	Government Privileges—Military and State Secrets
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 7.08	Government Privileges—Minor Government Secrets
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 7.09	Government Privileges—An Informant’s Identity
[1]	The Doctrine
[2]	Elements of the Foundation

Table of Contents

[3]	Sample Foundation
§ 7.10	Subsequent Repairs
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 7.11	Compromise Statements
[1]	Statements During Civil Settlement Negotiations
[2]	Statements During Plea Bargaining Negotiations

Chapter 8 THE BEST EVIDENCE RULE

§ 8.01	Introduction
§ 8.02	The Object Involved Is Not a “Writing”
§ 8.03	The Writing’s Terms Are Not “In Issue”
§ 8.04	The Writing’s Terms Are Only Collaterally “In Issue”
§ 8.05	The Evidence Offered Is an “Original”
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 8.06	The Evidence Offered Is a “Duplicate”
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 8.07	Admissible Types of Secondary Evidence
[1]	In General
[2]	An Authenticated Copy
[3]	Oral Recollection Testimony
§ 8.08	Excuses for Non-Production
[1]	In General
[2]	The Proponent Lost the Original
[3]	The Proponent Innocently Destroyed the Original
[4]	The Original Is in Official Custody
[5]	The Original Is in the Possession of a Third Party Beyond the Reach of the Court’s Compulsory Process
[6]	The Party-Opponent has Possession of the Original and Fails to Produce It After Notice to Produce
[7]	Voluminous or Bulky Records

Chapter 9 OPINION EVIDENCE

§ 9.01	Introduction
§ 9.02	Lay Opinion Testimony
[1]	In General

Table of Contents

[2]	Collective Fact Opinions
[3]	Skilled Lay Observer Testimony
[4]	Owners' Opinions about the Value of Their Property
§ 9.03	Expert Opinion Testimony
[1]	In General
[2]	The Expert's Qualifications to Form the Opinion
[3]	The General Methodology (The Theory or Technique) the Expert Relies On
[4]	The Case-Specific Factual Bases of the Expert's Opinion
[a]	Overview
[b]	Facts the Expert Personally Knows or That Are Otherwise Independently Admissible
[c]	Secondhand Reports From Third Parties
[d]	Hypothetically Assumed Facts
[e]	The Sufficiency of the Facts or Data to Support the Opinion
[5]	The Proper Application of the General Methodology to the Case-Specific Information
[6]	The Statement of the Opinion Itself
[7]	The Explanation of the Opinion
§ 9.04	Evidence of an Out-of-Court Experiment
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation

Chapter 10 THE HEARSAY RULE, ITS EXEMPTIONS, AND ITS EXCEPTIONS

PART A.	Introduction
§ 10.01	Overview
PART B.	Hearsay
§ 10.02	The Definition of Hearsay
[1]	In General
[2]	The Evidence Is an Assertive Statement or Act
[a]	Assertive Statements
[b]	Assertive Acts
[c]	Nonassertive Acts
[3]	The Statement Is Offered for a Hearsay Purpose
[a]	Overview
[b]	The Statement Is Circumstantial Proof of the Declarant's State of Mind—Mental Output
[c]	The Statement Is an Operative Fact or Verbal Act

Table of Contents

[d]	The Effect of the Statement on the Mind of the Hearer or Reader—Mental Input
[4]	The Statement Was Not Made by a Human Declarant
[5]	The Statement Was Made or the Act Performed by a Person Still Considered an Out-Of-Court Declarant
PART C. The Admissions Exemption Requiring a Showing of Neither Reliability Nor Necessity	
§ 10.03	The Exemption for Statements or Admissions of A Party-Opponent
[1]	In General
[2]	Personal Admissions
[a]	Overview
[b]	In Civil Cases
[c]	In Criminal Cases
[3]	Adoptive Admissions
[a]	Overview
[b]	Express Adoption
[c]	Implied Adoption by Silence—“Tacit Admission”
[4]	Vicarious Admissions
[a]	In Civil Cases
[b]	In Criminal Cases
PART D. Hearsay Exceptions Based Primarily on a Showing of Reliability	
§ 10.04	In General
§ 10.05	Business Entries
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 10.06	Official Records
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 10.07	Past Recollection Recorded and Present Recollection Refreshed or Revived
[1]	Past Recollection Recorded
[2]	Present Recollection Refreshed or Revived
§ 10.08	Learned Treatises
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 10.09	Excited or Startled Utterances
[1]	The Doctrine
[2]	Elements of the Foundation

Table of Contents

[3]	Sample Foundation
§ 10.10	Present Sense Impressions or Contemporaneous Statements
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 10.11	Declarations of State of Mind or Emotion
[1]	Offered to Prove State of Mind or Emotion
[2]	Offered to Prove Subsequent Conduct
§ 10.12	Declarations of Bodily Condition
[1]	Present Bodily Condition
[2]	Past Bodily Condition
[3]	External Cause or Source
PART E. Hearsay Exceptions Based on a Showing of Unavailability	
§ 10.13	In General
§ 10.14	The Unavailability of the Declarant at Trial
[1]	At Common Law and by Statute
[2]	As a Matter of Constitutional Law
§ 10.15	Declarations Against Interest
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 10.16	Dying Declarations
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 10.17	Former or Prior Testimony
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
§ 10.18	Forfeiture by Wrongdoing
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation
PART F. The Residual Hearsay Exception Based on Showings of Reliability and Necessity	
§ 10.19	The Residual Hearsay Exception
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation

Table of Contents

Chapter 11 SUBSTITUTES FOR EVIDENCE

§ 11.01	Introduction
§ 11.02	Stipulations
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundations
§ 11.03	Judicial Notice
[1]	The Doctrine
[2]	Sample Foundations
§ 11.04	Jury Views
[1]	The Doctrine
[2]	Elements of the Foundation
[3]	Sample Foundation

Index